

Introduction

It was her 29th birthday. After ending her shift as a nurse at West Atlanta Pediatrics, Brooke Melton headed out to meet her boyfriend for a celebratory dinner. She was a cautious driver – no speeding tickets, always a seat belt. But as she drove her Chevy Cobalt down the highway, it suddenly cut off. At just before 7:30 P.M. she swerved across the centerline. The oncoming car was unavoidable, it sent her careening into the fast-moving water of Picketts Mill Creek. Twenty minutes later, medics pulled her from the half-submerged Cobalt. And at 10 P.M., the hospital called Brooke's parents and told them about her accident, her broken neck, and how doctors could not save her.

After disbelief gave way to reality, her dad began playing back all the conversations he'd had with Brooke in the weeks before. He remembered how she'd complained that her car sometimes shut off while she was driving it. She had it serviced, fixed, just like he told her to. But as he pored over every detail of her accident and every online discussion board about Cobalts, he found others who'd had the same problems. Brooke was one of many.

The Meltons' subsequent lawsuit uncovered information that sparked a firestorm of suits against General Motors (GM) for ignition-switch defects, which the federal courts corralled before the same judge through a process known as multidistrict litigation, or MDL as it's often called.

In theory, multidistrict proceedings enable many "Davids," like Brooke's family, to pool their resources to efficiently litigate against Goliaths like GM. But, as Brooke's attorney discovered upon entering the inner sanctum of plaintiffs' lawyers who regularly spearhead these suits, there's a significant problem in practice: the system for handling mass torts can fail the very people it was meant to serve. Realizing this, her attorney tried to oust the insiders after learning that they cut a secret deal with GM. But the attempt fell on deaf ears. Why? Backroom deals benefit all the regulars – plaintiffs' lawyers, defendants, and even judges.

These proceedings matter – they involve high-stakes “bet-the-company” litigation and hundreds (sometimes thousands) of plaintiffs. Each proceeding like GM places a single judge in charge of all the similar federal claims filed across the country. Collectively, these proceedings consume more than one-third of the federal courts’ pending civil docket and 15–21% of newly filed cases. As the GM litigation suggests, these are not run-of-the-mill disputes; they involve high-profile media magnets like the opioid epidemic, Volkswagen’s emissions-cheating software, and Merck’s painkiller, Vioxx.

Federal judges certify a few of these proceedings as class actions, which installs the judge as a monitor and paves paths for objecting and appealing – safeguards, in short. But tort-reform efforts have made class certification harder. As the continued suits over defective products suggest, however, those claims haven’t gone away. Instead, they proceed as droves of individual suits packaged together by the courts and lawyers into a multidistrict proceeding. The risks for plaintiffs in those proceedings are significant: their lawyer may sell them out and the jury trials they’ve come to expect are rarer than a Perry Mason rerun.

This book marshals a wide array of empirical data on multidistrict litigation to suggest that the systemic lack of checks and balances for these cases may benefit everyone but the plaintiffs. Analyzing mass-tort proceedings centralized over 22 years and settled over 14, including the deals insiders negotiate, the “common-benefit” attorneys’ fees that the lead plaintiffs’ attorneys receive to run the litigation, as well as the judicial rulings themselves, reveals a troubling pattern: repeat plaintiff and defense attorneys persistently benefit from the current system. Defense lawyers are able to end sprawling lawsuits on their corporate clients’ behalf while lead plaintiffs’ lawyers broker deals that reward them handsomely and sometimes pay litigants very little.

For example, in litigation over the acid-reflux medicine Propulsid, only 37 of 6,012 plaintiffs (0.6%) recovered anything through the strict settlement program. Their collective recoveries totaled no more than \$6.5 million. Yet, defendant Johnson & Johnson agreed to pay lead lawyers more than \$27 million in common-benefit attorneys’ fees. In return, what was left of the fund (some \$45 million) would go back to Johnson & Johnson.¹ So, it appears that plaintiffs’ lawyers profited, Johnson & Johnson paid the equivalent of a regulatory fine, and most plaintiffs were left to puzzle over why they were left empty-handed.

Some cases face even greater risks. Instead of standing as a bulwark against self-dealing, 52.9% of judges not only actively encouraged settlement but also (to varying degrees) approved and enforced the private dispute resolution that resulted. For instance, Judge Susan Wigenton ordered all plaintiffs litigating against Zimmer for faulty hip replacements to participate in the settlement program or face dismissal. The settlement required that participating lawyers (everyone with a case in the federal proceeding) sign up *every* plaintiff they represented, regardless of whether the suit was in state or federal court and regardless of whether the client wanted to

¹ Chapter 2 includes further details.

settle. At the same time, Judge Wigenton stayed the multidistrict proceeding, which meant that plaintiffs couldn't continue their discovery efforts or try the slated bellwether cases. And, just in case some attorneys relied solely on state courts, Judge Wigenton sent letters to every state judge with a similar case, urging them to do the same.

As part of that settlement, the lawyers who'd negotiated the federal deal inserted a 4% common-benefit fee to reward themselves for their hard work. Consenting to settle meant consenting to pay leaders 4% of plaintiffs' recoveries – even if the claim wasn't in federal court. The settlement allowed leaders to contract around Judge Wigenton's earlier order forbidding them from taxing state-court cases. Put plainly, the lead lawyers used their official bargaining authority with the defendant to enrich themselves, which Judge Wigenton then approved.

Judge Wigenton's settlement directive bound an elderly plaintiff population to alternative dispute resolution for 18 months. Indeed, most settlements within the dataset included facets of private dispute resolution that you might ordinarily find in a consumer contract for cell phones or credit cards, provisions that evict disputes from court and resolve them before an arbitrator or mediator behind closed doors. In *Vioxx*, for instance, Judge Eldon Fallon, who publicly presided over the multidistrict proceeding, traded his black robe to become the private settlement's chief administrator where he sat not as an appealable Article III judge but as an arbitrator whose ruling was final, binding, and nonappealable.

Arbitration deprives citizens of jury trials and can raise self-dealing concerns as corporate defendants pay their favorite arbitrator to confidentially decide disputes. The *New York Times* recently ran a series on consumer arbitration entitled *Arbitration Everywhere, Stacking the Deck of Justice* that revealed “a far-reaching power play orchestrated by American corporations” to bar people from using the court system.² The message was that judges enforce plaintiffs' rights, arbitrators don't.

Because courts appear to remedy all the maladies that arbitration creates, its detractors hail judges as the answer: for both procedural and substantive reasons, litigation is better for consumers, employees, and plaintiffs of most any sort. But it isn't that simple in mass torts. Litigation is not the panacea that arbitration's opponents envision. Empirically analyzing the private, aggregate settlements in the dataset reveals that litigation isn't an antidote to arbitration – it's merely a precursor. Most settlement programs shared a great deal in common with arbitration. Plaintiffs didn't know whether they'd recover when they entered them, claims administrators may tilt justice in favor of the repeat players who pick them, confidential awards make it hard to tell if plaintiffs are treated fairly vis-à-vis one another, and internal “appeals” processes offered little relief.

² Jessica Silver-Greenberg & Robert Gebeloff, *Arbitration Everywhere, Stacking the Deck of Justice*, N.Y. TIMES, Oct. 31, 2015, at A1.

All this leaves us with a system in which each of the repeat players appears to benefit from the status quo. For their work on behalf of the plaintiffs, judicially appointed lead lawyers receive hefty common-benefit fees (sometimes upward of \$350 million) on top of the attorneys' fees from their own clients. Corporate defendants resolve litigation with what may be relatively minimal expense. Through settlement, judges clear their dockets and often receive favorable press and new high-profile cases. Third-party funders profit, too, by lending money to mass-tort plaintiffs and their law firms with substantial interest. And claims and settlement administrators (who often act a great deal like arbitrators) screen claims and dole out settlement funds – all for a price. The mass-tort system's private underbelly is vast, and the bargains are far-reaching.

By one token, my thesis is quite simple: all is not well in the mass-tort world. Using original empirical research, this book exposes a tight-knit network of repeat players and judges who use government power to push and enforce private deals. In this sense, the book offers what anthropologist Clifford Geertz would call a “thick description.”³ Thick descriptions do more than just crunch numbers and present data, they interpret and ascribe meaning to the practices they observe. As Thoreau put it in *Walden*, going “round the world to count the cats in Zanzibar” wouldn't tell you much else besides how many cats live in East Africa. And I'm afraid it just might put you off our whole endeavor.

Nevertheless, the equivalent of counting the cats in Zanzibar (a thin description) was a necessary predicate to ascribing any meaning to the MDL system as a whole. Gathering data, or counting cats so to speak, took the better part of six years. Here's a thumbnail of an example: I spent weeks just digging up the raw numbers for the *Propulsid* litigation – combing through more than 4,700 docket entries and downloading the relevant ones, reading transcripts, and piecing together the litigation chronology and numbers. It then took several more weeks to assemble the story through news reports, to identify plaintiffs' successes and setbacks, and to layer those data points into the earlier chronology.

From a bird's-eye view, my dataset includes all the products-liability and sales-practice proceedings pending on the MDL docket as of May 14, 2013 – 73 proceedings, centralized over 22 years and settled over 14. Those proceedings collectively included more than 312,500 actions, most of which have now concluded. (An “action,” by the way, is a single civil suit, but that one suit may contain many plaintiffs – consolidating claims allows plaintiffs' attorneys to avoid paying hundreds of dollars in filing fees for each person.) Parties settled 34 of those 73 proceedings through nonclass global or inventory settlements, 20 through class-action settlements, 1 through individual settlements, and 1 through bankruptcy. Most class-action settlements involved sales-practice cases without personal injuries, whereas most personal-injury products-liability cases like *Propulsid* settled through private

³ CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 27 (1973).

global or inventory settlements. For those that weren't settled, defendants successfully used *Daubert* motions on expert evidence, summary judgment, and arbitration to resolve 12 proceedings, and the remaining 5 proceedings are still being actively litigated.

This book focuses principally on those mass-tort proceedings that ended in private settlement. Of those 34 proceedings, private settlements were publicly available in 10. Three of those 10 proceedings contained 2 settlements each for a total of 13 settlements. While 13 deals may not sound like much, collectively they covered more than 64,000 federal "actions" as well as thousands of uncounted but related state-court cases. For statistics enthusiasts, the Appendix includes far more details.

Like all data-rich research, moving from tallying cats into broader theories about how to best interpret those numbers invites controversy. You can construe my numbers in different ways, and there will certainly be squabbles about what conclusions to draw.

As I wrote this book, for instance, I presented my theories to various audiences and often incorporated the *Propulsid* data. Sometimes audience members included Judge Eldon Fallon, who presided over *Propulsid*; Susan Sharko, who represented Johnson & Johnson; and various involved plaintiffs' attorneys. They lived those proceedings and would each tell you a very different story. Their understandings invariably differ from my retrospective view as an outside observer.

In this sense, the book reflects my conscious choices about how to present data and which case studies to feature based not only on the numbers but also on my reading of the thousands of motions, arguments, and court transcripts that accompany this raw data. Of course, there may be things that I miss; this area of law is dynamic and evolving. There is ever so much more to do. In that sense, this book is meant to provide a portal into this world, to invite discussion, debate, and further conversations – not to have the last word. To facilitate that discursive process, I have made all the data that I've collected over the past six years publicly available.⁴

Experts in the field have debated how to handle mass torts for many years now and I hope that they will discover a new tidbit, perspective, or twist in the pages that follow. But mass torts aren't just about academics, lawyers, or even judges – they affect the masses. More specifically, they affect real people like Brooke Melton and her family, as individuals.

Consequently, to make the entire book more accessible to a diverse audience, I've tried to tone down the legal and technical jargon and add narrative to the data through case studies, vignettes, anecdotes, and quotes. And, of course, because my theories rely on a variety of insights from social psychology, behavioral law and economics, and complex adaptive systems, some aspects of the material may be new to most readers. To be sure, case studies and anecdotes cannot substitute for careful

⁴ You may access and search that data at <http://mdldata.law.uga.edu> and <https://www.elizabeth-chambleeburch.com/>. The password for protected pages is MDLRepeatplay.

evidence. So, for those who would prefer to dive deeper into the technical details, I have included extensive footnotes and appendices.

Before we get on with the book, let me add two caveats. First, despite putting these proceedings under the microscope, some information just isn't publicly available. As the Appendix details, most private aggregate settlements remain private. Even those that are publicly available rarely include information on substantive outcomes – what plaintiffs received, in other words. (Judge Fallon's dockets are usually an exception, and I remain deeply grateful for his commitment to transparency.)

This leaves a big gap and a host of questions: how do outcomes in nonclass multidistrict proceedings compare with those in class actions and those settled outside the centralized proceeding? How much money is paid out and to whom? How long does it take to administer claims? Are like plaintiffs treated equally? How much does it cost to put settlement money in class members' hands versus the costs of paying plaintiffs in private, aggregate settlements? Are plaintiffs treated differently in inventory settlements with a single law firm as opposed to global deals?⁵ I could go on. But you get the idea, right? This book is a start, but we're left feeling our way around in the dark on many critical points. And I worry about that.

One more caveat: as Clifford Geertz explains, for thick descriptions, "Behavior must be attended to, and with some exactness, because it is through the flow of behavior – or, more precisely, social action – that cultural forms find articulation."⁶ So, I have chosen to use names where exactness is important. The point is not to be salacious, but specific. Divorcing interpretation from what happens "from what, in this time or that place, specific people say, what they do, what is done to them," takes us away from the "heart" of what we're interpreting, Geertz notes.⁷

Still, when people talk about class actions and aggregate litigation, they tend to take cheap shots at the plaintiffs' attorneys who bring them. That's not my aim. In the pages that follow, you will see that I am quite critical of the way attorneys on both sides conduct themselves in this ethical minefield. And it just so happens that ethical obligations are more perilous for plaintiffs' lawyers representing the masses, so my fault finding falls most heavily upon them. But let me make one thing clear: my critique is of the *system as a whole*. Plaintiffs' lawyers do not have a monopoly on systemic failings and misaligned incentives; there is ample blame to go around. Plaintiffs' attorneys must often accept settlement offers as defendants present them, so defendants and their attorneys are on the hook too.

In short, this book aims to shed some light on the high-stakes world of mass torts. It suggests that tunnel vision toward efficiency undermines more than just a

⁵ So-called inventory settlements resolve one law firm's cases. I'm not a fan of the term because it makes people seem like stock, but it is used frequently among courts and attorneys. A "global" settlement, by contrast, resolves most suits brought by many different firms.

⁶ GEERTZ, *supra* note 3, at 17.

⁷ *Id.* at 18.

plaintiff's payday. It means fewer jury trials, less transparency, less precedent, and more private dispute resolution (under the guise of Article III courts no less). We seem to have forgotten that legitimate procedures are the skeletal structure that hold the meatier substantive rights and values together. When procedures collapse, so too do communal democratic values, the public's faith in the system's legitimacy, and even the rule of law.